

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matter of |) |
| |) |
| Daniel D. Smith |) File No.: EB-10-KC-0021 |
| |) |
| Licensee of Station KANR |) NAL/Acct. No. 201132560001 |
| Belle Plaine, Kansas |) |
| Facility ID #15410 |) FRN: 0002288728 |
| Owner of Antenna Structure #1033278 |) |
| |) |

FORFEITURE ORDER

Adopted: May 4, 2011

Released: May 5, 2011

By the Regional Director, South Central Region, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of eleven thousand five hundred dollars (\$11,500) to Daniel D. Smith, licensee of Station KANR and owner of antenna structure number 1033278 in Belle Plaine, Kansas (“Mr. Smith”), for willful and repeated violation of sections 11.35(a), 17.47, 17.50, and 73.3526 of the Commission’s Rules (“Rules”).¹ The noted violations involve Mr. Smith’s failure to: (1) maintain operational emergency alert system (“EAS”) equipment; (2) make an observation of antenna structure lighting at least once each 24-hour period; (3) repaint the antenna structure as necessary to maintain good visibility; and (4) maintain and make available a complete public inspection file.

II. BACKGROUND

2. As discussed in detail in the *Notice of Apparent Liability for Forfeiture* (“*NAL*”) in this case,² on March 31, 2010, during an inspection of the main studio for Station KANR and antenna structure number 1033278, agents from the Enforcement Bureau’s Kansas City Office (“Kansas City Office”) observed that: (1) Station KANR’s EAS equipment was inoperable; (2) the station’s public inspection file was missing quarterly issues/programs lists after the fourth quarter of 2008; and (3) the paint on Station KANR’s tower was severely faded and chipped in many places. During the inspection, Mr. Smith admitted that: (1) an operational EAS encoder/decoder unit had not been operational since sometime between 2000 and 2006; (2) no issues/programs lists had been filed in the public inspection file since the fourth quarter of 2008; (3) the station did not have any automated equipment to monitor the structure’s lighting; (4) station personnel were not visually monitoring the lighting on the structure every 24 hours; and (4) Station KANR’s tower was last painted in 1996. Mr. Smith also stated that he had last observed the tower several days before the inspection.³ Mr. Smith had no logs or records documenting his observations or any failures in the lights.

¹ 47 C.F.R. §§ 11.35(a), 17.47, 17.50, 73.3526.

² *Daniel D. Smith*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 15874 (Enf. Bur., 2010).

³ During the inspection, Mr. Smith stated that he had observed the tower on March 29, 2010 during the daytime,
(continued...)

3. In view of the record evidence, including Mr. Smith's admissions, the *NAL* proposed a forfeiture of \$25,000 against the licensee for violation of sections 11.35(a), 17.47, 17.50, and 73.3526 of the Rules. Mr. Smith submitted responses to the *NAL* requesting reduction or cancellation of the proposed forfeiture based on his inability to pay the forfeiture, his prompt actions to remedy the violations, and his remorse.⁴

III. DISCUSSION

4. The proposed forfeiture amount in this case was assessed in accordance with section 503(b) of the Communications Act of 1934, as amended ("Act"),⁵ section 1.80 of the Rules,⁶ and the *Forfeiture Policy Statement*.⁷ In examining Mr. Smith's response, section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.⁸ As discussed below, we have considered Mr. Smith's response in light of these statutory factors and reduce the proposed forfeiture to \$11,500, based on his documented inability to pay.

5. Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.⁹ The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act¹⁰ and the Commission has so interpreted the term in the section 503(b) context.¹¹ The Commission

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when the lights were not exhibited, so he was unable to assess whether the lights were operating properly. Mr. Smith said that he observed the exhibited lights on the tower sometime before March 29, 2010, but he could not recall the precise day. See *NAL* at note 4.

⁴ See Letter from Daniel D. Smith, licensee of Station KANR, to Kansas City Office, Enforcement Bureau, dated December 10, 2010 ("*NAL Response*"); Letter from Daniel D. Smith, licensee of Station KANR, to Kansas City Office, Enforcement Bureau, dated December 10, 2010 ("*Request for Reduction*").

⁵ 47 U.S.C. § 503(b).

⁶ 47 C.F.R. § 1.80.

⁷ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

⁸ 47 U.S.C. § 503(b)(2)(E).

⁹ 47 U.S.C. § 312(f)(1).

¹⁰ H.R. Conf. Rep. No. 97-765, at 51 (1982) ("This provision [inserted in section 312] defines the terms 'willful' and 'repeated' for purposes of section 312, and for any other relevant section of the act (e.g., section 503) As defined[,] . . . 'willful' means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. 'Repeated' means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be 'continuous' would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in sections 312 and 503, and are consistent with the Commission's application of those terms").

¹¹ See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992) ("*Southern California Broadcasting Co.*").

may also assess a forfeiture for violations that are merely repeated, and not willful.¹² “Repeated” means that the act was committed or omitted more than once, or lasts more than one day.¹³

6. Every broadcast station is part of the nationwide EAS network and is categorized as a participating national EAS source unless the station affirmatively requests authority to refrain from participation, and that request is approved by the Commission.¹⁴ The EAS enables the President and state and local governments to provide immediate and emergency communications and information to the general public.¹⁵ State and local area plans identify local primary sources responsible for coordinating carriage of common emergency messages from sources such as the National Weather Service or local emergency management officials.¹⁶ Required monthly and weekly tests originate from EAS Local or State Primary sources and must be retransmitted by the participating station. As the nation’s emergency warning system, the Emergency Alert System is critical to public safety, and we recognize the vital role that broadcasters play in ensuring its success. The Commission takes seriously any violations of the Rules implementing the EAS and expects full compliance from its licensees.

7. Section 11.35(a) of the Rules requires all broadcast stations to ensure that EAS encoders, EAS decoders, and attention signal generating and receiving equipment are installed and operational so that the EAS monitoring and transmitting functions are available during the times a station is in operation.¹⁷ Mr. Smith does not deny any of the facts stated in the *NAL* concerning the station’s EAS equipment¹⁸ and admits that the station’s EAS equipment was not functioning from at least 2006 through the time of the March 31, 2010 inspection.¹⁹ Thus, based on the evidence before us, we find that Mr. Smith willfully and repeatedly violated section 11.35(a) of the Rules by failing to maintain operational EAS equipment.

8. Section 17.47(a) of the Rules states that the owner of any antenna structure that is registered with the Commission and has been assigned lighting specifications “(1) [s]hall make an observation of the antenna structure’s lights at least once each 24 hours either visually or by observing an automatic properly maintained indicator designed to register any failure of such lights, to insure that all such lights are functioning properly as required; or alternatively, (2) [s]hall provide and properly maintain an automatic alarm system designed to detect any failure of such lights and to provide indication of such failure to the owner.”²⁰ Station KANR’s antenna structure is 151 meters above ground in height and must be

¹² See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362 ¶ 10 (2001) (“*Callais Cablevision, Inc.*”) (proposing a forfeiture for, *inter alia*, a cable television operator’s repeated signal leakage).

¹³ *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

¹⁴ 47 C.F.R. §§ 11.11, 11.41.

¹⁵ 47 C.F.R. §§ 11.1, 11.21.

¹⁶ 47 C.F.R. § 11.18. State EAS plans contain guidelines that must be followed by broadcast and cable personnel, emergency officials and National Weather Service personnel to activate the EAS for state and local emergency alerts. The state plans include the EAS header codes and messages to be transmitted by the primary state, local and relay EAS sources.

¹⁷ 47 C.F.R. § 11.35(a).

¹⁸ See *NAL* at 15874-15875.

¹⁹ *NAL Response* at 1.

²⁰ 47 C.F.R. § 17.47(a).

painted and lit.²¹ Mr. Smith admits that the station's automatic remote control light monitoring system was out for repair and that the station failed to make observations of its antenna structure once every 24 hours.²² Therefore, based on the evidence before us, we find that Mr. Smith willfully and repeatedly violated Section 17.47 of the Rules by failing to make a visual observation of antenna structure lighting at least once each 24 hour period on March 29 and March 30, 2010.

9. Section 17.50 of the Rules states that "[a]ntenna structures requiring painting under this part shall be cleaned or repainted as often as necessary to maintain good visibility."²³ Although Mr. Smith admits that he last painted Station KANR's tower in 1996, he asserts that only five feet on one of three sides of the 20 foot base was unpainted at the time of the inspection, that the paint on the remainder of the tower was clearly visible, and that the condition of the paint "does not rise to the level of negligence to be actionable, and in the alternative, certainly does not merit a fine of \$10,000."²⁴ However, he also states that he does "not deny the paint on my tower has faded to the point that in the interest of safety should be repainted."²⁵ Agents' notes and pictures from the March 31, 2010 inspection demonstrate, however, that the tower's paint was severely faded and that bare metal was showing in many places on the structure. Thus, based on the evidence before us, we find that Mr. Smith willfully and repeatedly violated section 17.50 of the Rules by failing to repaint the antenna structure as necessary to maintain good visibility.

10. Section 73.3526 of the Rules states that "[e]very permittee or licensee of an AM, FM, TV or a Class A station in the commercial broadcast services shall maintain a public inspection file containing the material" set forth in that section.²⁶ The public inspection file must be maintained at the main studio of the station,²⁷ and must be available for public inspection at any time during regular business hours.²⁸ Section 73.3526(e)(12) of the Rules requires commercial AM and FM broadcast stations to place a list of programs that have provided the station's most significant treatment of community issues during the preceding three month period in the station's public inspection file.²⁹ The issues/programs list for each calendar quarter is to be filed by the tenth day of the succeeding calendar quarter. On March 31, 2010, during normal business hours and in response to a request for inspection, agents from the Kansas City Office observed that the station's public inspection file was missing all issues/programs lists after the fourth quarter of 2008. Mr. Smith asserts that the station aired public affairs programming and that the items of importance are marked on his desk calendar, but admits that the station's public inspection file was missing issues/programs lists after the fourth quarter of 2008.³⁰ Therefore, based on the evidence before us, we find that Mr. Smith willfully and repeatedly violated section 73.3526(e)(12) of the Rules by failing to maintain all required issues/programs lists in the station's public inspection file and willfully violated section 73.3526 of the Rules by failing to make available a complete public inspection file.

²¹ Antenna structures must be painted and lighted when they exceed 60.96 meters in height above ground. See 47 C.F.R. § 17.21.

²² *NAL Response* at 1-2.

²³ 47 C.F.R. § 17.50.

²⁴ *NAL Response* at 2-3.

²⁵ *Id.*

²⁶ 47 C.F.R. § 73.3526(a)(2).

²⁷ 47 C.F.R. § 73.3526(b).

²⁸ 47 C.F.R. § 73.3526(c).

²⁹ 47 C.F.R. § 73.3526(e)(12).

³⁰ *NAL Response* at 1.

11. In the *NAL Response*, Mr. Smith states that, following the inspection, he promptly corrected the EAS and public inspection file violations, installed a working automatic light monitoring system, and hired a painting contractor to repaint the tower as soon as possible,³¹ and that he will “never again place myself in such an unfortunate and embarrassing situation.”³² The Commission has long held, however, that post-inspection corrective action taken to come into compliance with the Rules is expected, and such corrective action does not nullify or mitigate any prior forfeitures or violations.³³ We therefore conclude that a reduction or cancellation of the forfeiture is unwarranted in this case.

12. Finally, Mr. Smith asserts that the forfeiture would pose a financial hardship and requests reduction or cancellation of the forfeiture on this basis.³⁴ With regard to an individual’s or entity’s inability to pay, the Commission has determined that, in general, gross revenues are the best indicator of an ability to pay a forfeiture.³⁵ We have reviewed Mr. Smith’s submitted documentation and conclude that a reduction of the forfeiture based on the licensee’s inability to pay is warranted. Thus, we conclude that Mr. Smith is liable for a forfeiture in the amount of \$11,500, an amount equal to 7.7 percent of Station KANR’s average gross revenues.

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to section 503(b) of the Communications Act of 1934, as amended, and sections 0.111, 0.204, 0.311, 0.314, and 1.80(f)(4) of the Commission’s Rules, Daniel D. Smith **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of eleven thousand five hundred dollars (\$11,500) for violations of section 11.35(a), 17.47, 17.50, and 73.3526 of the Rules.³⁶

14. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.³⁷ Payment of the forfeiture must be made by check or similar instrument, payable to the order of the

³¹ *NAL Response at 1-3.*

³² *Request for Reduction at 1.*

³³ See *Seawest Yacht Brokers*, Forfeiture Order, 9 FCC Rcd 6099 (1994) (finding attempts to comply with licensing requirements following initial violation are expected and do not warrant reduction or cancellation of forfeiture); *Rama Communications, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 4981 (Enf. Bur. 2009) (finding post-inspection correction of tower painting, tower fencing, public inspection file and overpower operation violations is expected and does not warrant reduction or cancellation of forfeiture); *Bethune-Cookman College, Inc.*, Forfeiture Order, 24 FCC Rcd 4513 (South Central Region 2009) (finding installation of required EAS decoder after an inspection is expected and does not warrant reduction or cancellation of forfeiture); *International Broadcasting Corporation*, Order on Review 25 FCC Rcd 1538 (2010) (finding post-inspection attempts to paint and register antenna structure are expected and do not warrant reduction or cancellation of forfeiture).

³⁴ *Request for Reduction at 1-2.*

³⁵ See *PJB Communications of Virginia, Inc.*, Forfeiture Order, 7 FCC Rcd 2088, 2089 (1992) (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator’s gross revenues); *Local Long Distance, Inc.*, Forfeiture Order, 16 FCC Rcd 24385 (2000) (forfeiture not deemed excessive where it represented approximately 7.9 percent of the violator’s gross revenues); *Hoosier Broadcasting Corporation*, Forfeiture Order, 15 FCC Rcd 8640 (2002) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator’s gross revenues).

³⁶ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80(f)(4), 11.35(a), 17.47, 17.50, 73.3526.

³⁷ 47 U.S.C. § 504(a).

Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. Mr. Smith shall also send electronic notification on the date said payment is made to SCR-Response@fcc.gov.

15. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by both First Class and Certified Mail Return Receipt Requested to Daniel D. Smith at his address of record.

FEDERAL COMMUNICATIONS COMMISSION

Dennis P. Carlton
Regional Director, South Central Region
Enforcement Bureau